BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KAREN K. CLAIBOURN	)	
Claimant	)	
VS.	)	
	)	Docket No. 228,496
WILSON COUNTY HOSPITAL	)	
Respondent	)	
AND	)	
	)	
KANSAS HOSPITAL ASSOCIATION WCF, INC.	)	
Insurance Carrier	)	

ORDER

Claimant appealed Administrative Law Judge John D. Clark's February 18, 1999, Award. The Appeals Board heard oral argument on August 4, 1999.

APPEARANCES

Claimant appeared by her attorney, William L. Phalen of Pittsburg, Kansas. Respondent and its insurance carrier appeared by their attorney, Wade A. Dorothy of Lenexa, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and has adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge found claimant failed to provide respondent with the statutory required timely notice of accident.[1] Accordingly, he denied claimant's request for workers compensation benefits.

On appeal, claimant contends she provided respondent with timely notice of accident. Therefore, claimant argues she is entitled to a 61.5 percent work disability award

[1] *See* K.S.A. 44-520.

based on a 23 percent work task loss and a 100 percent wage loss.[2] Further, claimant contends she is entitled to both future and unauthorized medical expenses.

Conversely, respondent contends the Administrative Law Judge's Award denying claimant workers compensation benefits based on her failure to provide respondent with timely notice of accident should be affirmed. Further, respondent contends, if the Appeals Board finds claimant proved she provided respondent with timely notice of accident, claimant has only proved she is entitled to a permanent partial general disability award of somewhere between 12.5 to 15 percent. The respondent argues claimant is limited to an award based on a 25 percent functional impairment reduced by preexisting functional impairment of 10 to 12.5 percent.[3]

At oral argument, the parties agreed that if the Appeals Board found claimant provided respondent with timely of notice of accident, then the Appeals Board should decide all remaining issues, instead of remanding the case to the Administrative Law Judge.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board makes the following findings and conclusions:

Did claimant provide respondent with timely notice of accident?

Claimant started working for the respondent on June 17, 1994, preforming general housekeeping duties. In 1991 before claimant was employed by respondent, she had persistent low-back problems and was treated by orthopedic surgeon Kevin M. Mosier, M.D. The doctor's assessment was symptomatic grade II, L5-S1 spondylolisthesis with degenerative disc disease changes at L4-5 and L5-S1. On May 21, 1991, Dr. Moser performed an L4 through S1 lumbar fusion with instrumentation. Dr. Moser followed claimant until April 8, 1992, when he released her to return to work without restrictions.

Claimant testified her back remained asymptomatic until she started to have low-back pain and numbness radiating down her right leg in November of 1996 while employed by the respondent. She testified she told her immediate supervisor, Clay Eury, that the housekeeping work activities she was performing for the respondent hurt her back and she was going to see her family physician, F. Allen Moorehead, Jr., M.D., for her back problems.

Claimant first saw Dr. Moorehead on November 27, 1996. Dr. Moorehead had claimant undergo a CAT scan that showed a bulging disc. The doctor then placed claimant into a physical therapy program at respondent's hospital during her regular work hours.

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[2] *See* K.S.A. 1996 Supp. 44-510e(a).

[3] *See* K.S.A. 1996 Supp. 44-501(c).

During the time claimant was treated by Dr. Moorehead, claimant testified her supervisor made accommodations to her housekeeping job. He provided smaller trash cans with rollers for her to empty the trash, allowed her to roll the laundry to the laundry room in a cart instead of dragging the laundry to the laundry room, had other employees help her lift blankets from the washing machine, and helped her mop the floors.

On December 26, 1996, Dr. Moorehead referred claimant to Dr. Mosier who had previously treated her in 1991. Dr. Mosier saw claimant only once on January 3, 1997. The doctor found claimant had a six-week history of lumbar and bilateral leg pain predominantly on the right. The doctor opined that claimant's housekeeping duties had aggravated her preexisting low-back condition. The doctor returned claimant to work with restrictions of no lifting of the laundry from washing machine and no mopping. He prescribed three epidural injections. Claimant had only one injection because it was very painful and she did not experience any relief.

Dr. Mosier was contacted by the respondent through Linda John, respondent's human resource manager, on January 10, 1997. As a result of that telephone conversation, Dr. Mosier wrote a letter to Ms. John that indicated claimant's restrictions were permanent. He further stated, "This is not a workmen's compensation claim case." But Dr. Mosier testified he had changed his opinion and agreed that claimant's work activities while employed by the respondent, primarily the lifting of the laundry and the mopping, had aggravated claimant's preexisting low-back condition.

Both claimant's supervisor, Clay Eury, and respondent's human resource director, Linda John, testified extensively concerning the timely notice issue. Mr. Eury admitted he had other housekeeping employees assist claimant in performing mopping and lifting of the heavy blankets from the washing machine because claimant complained those duties hurt her low back. He also acknowledged he knew the claimant was receiving medical treatment for her low-back problems that included physical therapy at respondent's hospital.

In January 1997, Mr. Eury was informed that claimant was restricted by one of her treating physicians from mopping and lifting laundry because those duties caused her low-back discomfort. Mr. Eury was asked why he did not fill out an accident report at that time in reference to claimant's low-back problems. Mr. Eury replied that he didn't believe claimant's complaints were work related because she had a preexisting degenerative disc problem.

Linda John also acknowledged she knew that claimant had a preexisting low-back problem before claimant complained of pain and discomfort and sought medical treatment in November of 1996. Ms. John also testified that after she received Dr. Mosier's restrictions of no lifting of laundry or mopping dated January 3, 1997, she telephoned Dr. Mosier and discussed with him claimant's medical condition and the restrictions. As a result of the telephone conversation, Dr. Mosier sent Ms. John the January 10, 1997, letter that

confirmed the restrictions were permanent and also stated, "This is not a workmen's compensation claim case."

Ms. John testified claimant was terminated on January 17, 1997, because respondent did not have a job claimant could perform within the permanent work restrictions. Ms. John also testified she completed a disability form for claimant's signature that indicated claimant was not covered by workers compensation. Furthermore, Ms. John testified she did not believe claimant's low-back problem was a workers compensation claim because Dr. Mosier had stated in the January 10, 1997, letter this was not a workers compensation claim. Ms. John was also asked if an aggravation of a worker's degenerative disc disease was a workers compensation claim. She replied, "I'm not qualified to make that decision."

The Administrative Law Judge found claimant had failed to provide respondent with timely notice of accident. The Administrative Law Judge found Mr. Eury's testimony persuasive that he could not recall any conversation with claimant where she alleged her back problems were related to her work. Further, the respondent contends claimant did not present any medical bills to her supervisor for payment of medical expenses to treat her low-back problem. Additionally, the Administrative Law Judge found Ms. John's testimony persuasive that claimant never notified Ms. John that her low-back problems were related to her work activities. The Administrative Law Judge noted Dr. Mosier notified Ms. John that this was not a workers compensation case. Furthermore, the claimant signed a disability claim filled out by Ms. John that indicated claimant was not covered by workers compensation.

The notice statute requires claimant to notify the respondent of a work-related accident within 10 days of the date of the accident stating the time and the place and the particulars thereof. But actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary.[4]

The Appeals Board disagrees with the Administrative Law Judge and finds that claimant did provide respondent with notice of accident within 10 days. The Appeals Board concludes the record established that claimant's work activities aggravated or accelerated her preexisting low-back condition. The respondent terminated claimant on January 17, 1997, because respondent did not have a job claimant could perform within the permanent restrictions imposed as the result of her work-related low-back injury. Claimant established through her testimony that her low-back pain and discomfort worsened through the January 17, 1997, termination date. Accordingly, the Appeals Board finds January 17, 1997, is claimant's appropriate date of accident.[5] Furthermore, the testimony of claimant, her supervisor, and respondent's human resource director, established that claimant notified

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[4]*See* K.S.A. 44-520.

[5]Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

her supervisor and the respondent's human resource director before she was terminated on January 17, 1997, that her work activities were hurting her back. Also, the Appeals Board concludes that the respondent, through claimant's supervisor, Clay Eury, had notice that claimant's work activities were causing her pain and discomfort to the point he made revisions to claimant's job and had other employees either assist or do claimant's job responsibilities of lifting heavy blankets from the washing machine and mopping floors.

Respondent seems to make the argument that since Dr. Mosier made a legal conclusion that claimant's low-back problems did not constitute a workers compensation claim, then respondent did not have notice of a work-related accident. The Appeals Board finds the notice statute only requires the worker to give notice that he or she sustained an injury by accident at work. The notice statute requirement is satisfied by the claimant notifying the respondent that a specific accident or regular work activities caused injury. The statute does not require the claimant to prove to respondent at that time all the various conditions necessary to support a workers compensation claim.

What is the nature and extent of claimant's disability?

On appeal, before the Appeals Board, the respondent did not dispute that claimant suffered a work-related low-back injury while employed by the respondent. Claimant's testimony, coupled with the testimony of one treating physician and two examining physicians, supports the conclusion that claimant's housekeeping work activities permanently aggravated or accelerated her preexisting low-back condition.[6]

After respondent terminated claimant on January 17, 1997, claimant testified she has not attempted to find other appropriate employment. In fact, claimant currently is receiving monthly social security disability benefits. The evidence before the Appeals Board does not indicate claimant is unable to work. The Appeals Board, therefore, finds claimant has not made a good faith effort to find appropriate employment and a post-injury average weekly wage should be imputed.[7]

Two physicians testified in this case and expressed opinions on claimant's permanent functional impairment, preexisting functional impairment, permanent work restrictions, and claimant's loss of work task performing ability.

Claimant's attorney had her examined and evaluated by orthopedic surgeon Edward J. Prostic, M.D., on September 5, 1997. Dr. Prostic found claimant had most likely injured L3-4 or had aggravated her preexisting disc disease at L4-L5. In accordance with the AMA Guides to the Evaluation of Permanent Impairment, (AMA Guides) Fourth Edition, the doctor assessed claimant with a 25 percent permanent functional impairment of the whole

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[6]Harris v. Cessna Aircraft Co., 9 Kan. App. 2d 334, 336, 678 P.2d 178 (1984).

[7]Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

body. He believed 10 percent of the 25 percent was preexisting. The doctor imposed work restrictions of occasionally lifting of 25 pounds, frequently lifting of 10 pounds, avoid frequent bending or twisting at the waist, avoid forceful pushing or pulling, avoid use of vibrating equipment, and recommened she change positions frequently. Dr. Prostic was shown a list of job tasks that claimant had perform in jobs she was employed in 15 years next preceding her accident date of January 17, 1997. This job task list had been complied by vocational expert Karen Crist Terrill. Ms. Terrill had taken Dr. Prostic's permanent work restrictions and had applied those restrictions to each of the 26 job tasks listed. She had found that claimant could no longer perform 6 of the 26 job tasks. Dr. Prostic reviewed the job task list and agreed with Ms. Terrill's determination that claimant had lost 23 percent of her ability to perform the job tasks.

The Administrative Law Judge appointed orthopedic surgeon Dale E. Darnell, M.D., to perform an independent medical examination of the claimant. Dr. Darnell saw the claimant on March 27, 1998. The doctor diagnosed spondylolisthesis of the lumbar spine and post-operative L4 to sacrum fusion utilizing internal stabilizing devices not related to her work activities while employed by the respondent. He also diagnosed claimant with a chronic lumbar strain as the direct result of her work activities while employed by respondent. Utilizing the AMA Guides, Fourth Edition, he opined that claimant had a 25 percent permanent functional disability of the body as a whole. He went on to conclude that in his opinion 50 percent of claimant's condition was preexisting. Dr. Darnell was also shown the same job task list that Dr. Prostic had reviewed that had been complied by vocational expert Karen Crist Terrill. After he reviewed the list, he found claimant could not perform the two job tasks that required her to dry and wet mop floors. Those two job tasks were included in her duties as a housekeeper for the respondent. Also, because Dr. Darnell thought claimant should not lift more than 50 pounds, he opined that claimant was not able to do the job task of making pizza that she had to perform while employed at Casey's General Store. Accordingly, Dr. Darnell found claimant had lost the ability to perform 3 out of the 26 job tasks listed for a 12 percent job task loss.

In regard to wage loss, vocational expert Karen Crist Terrill testified that claimant retained the ability to earn a minimum wage working 40 hours per week. Therefore, because claimant did not make a good faith effort to find appropriate employment, a post-injury average weekly wage of $206 should be imputed to claimant in determining work disability. Comparing the pre-injury average weekly wage of $301.97 with the imputed $206 post-injury average weekly wage equals a 32 percent wage loss.

Both Dr. Darnell and Dr. Prostic found claimant had sustained a 25 percent permanent functional impairment of the body as whole. Both physicians also found a portion of the 25 percent rating was preexisting. Dr. Darnell testified that claimant's preexisting low-back condition contributed 50 percent to her resulting disability. Dr. Prostic testified that 10 percent of his 25 percent functional rating was preexisting. The Appeals Board will give equal weight to these two expert opinions and finds that claimant's preexisting functional impairment is 11 percent. As required by statute, when the 25

percent total functional impairment rating is reduceed by the 11 percent preexisting rating, claimant has sustained a 14 percent permanent impairment of function.

In computing claimant's work disability, the Appeals Board finds equal weight should be given to Dr. Darnell's 12 percent work task loss opinion and Dr. Prostic's 23 percent work task loss opinion resulting in a 17.5 percent loss. As required, when the 17.5 percent work task loss is averaged with the 32 percent wage loss, claimant is entitled to a 24.75 percent work disability.[8] That disability percentage is required to be reduced by the above found 11 percent preexisting functional impairment resulting in a 13.75 percent work disability.[9]

The Appeals Board concludes, since claimant's 13.75 percent work disability is less than her 14 percent functional impairment rating, claimant is entitled to permanent partial general disability award of 14 percent.[10]

Future medical treatment and unauthorized medical expenses.

The Appeals Board finds future medical treatment may be awarded upon proper application and approval of the director.

Also, unauthorized medical expenses up to the statutory maximum is awarded to the claimant upon proper presentation of the expense.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark dated February 18, 1999, should be, and is hereby, reversed and an award of compensation is made as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Karen K. Claibourn, and against the respondent, Wilson County Hospital, and its insurance carrier, Kansas Hospital Association WCF, Inc., for an accidental injury which occurred on January 17, 1997, and based upon an average weekly wage of $301.97.

Claimant is entitled to 58.1 weeks of permanent partial disability compensation at the rate of $201.32 per week for a 14% permanent partial general disability, making a total award of $11,696.69, which is all due and owing and is ordered paid in one lump sum less any amount previously paid.

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[8] *See* K.S.A. 1996 Supp 44-510e(a).

[9] *See* K.S.A. 1996 Supp 44-501(c).

[10] *See* K.S.A. 1996 Supp. 44-510e(a).

Future medical treatment for claimant's injuries may be awarded upon proper application to and approval by the Director.

Unauthorized medical expense up to the statutory maximum is awarded to the claimant upon proper presentation of the expense.

All authorized reasonable and necessary medical expenses are ordered paid by the respondent.

All remaining orders contained in the Award are adopted by the Appeals Board.

IT IS SO ORDERED.

Dated this _____ day of November 1999.

_____
BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: William L. Phalen, Pittsburg, KS
Wade A. Dorothy, Lenexa, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director